APPEAL NO. 93016

At a contested case hearing held in (city), Texas, on December 14, 1992, the hearing officer, (hearing officer), determined that respondent (claimant) suffered a repetitive trauma injury while in the course and scope of his employment with Stone Container Corporation (employer), that he gave timely notice of this injury to employer, and that he had disability under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon Supp. 1993) (1989 Act) for a period of four weeks. Appellant (carrier) challenges the sufficiency of the evidence to support these determinations and claimant urges our affirmance.

DECISION

Finding that additional findings and conclusions are necessary, we reverse and remand.

Claimant worked for employer for 12 years and his duties involved the operation of a Curioni (Flex-O-Fold) machine which made corrugated cardboard boxes. Claimant and a coworker would take turns feeding and stacking piles of corrugated cardboard weighing between 40 and 50 pounds into the machine and rolling bundles along a conveyor. Claimant's supervisor, described these duties as being a repetitive process of lifting, pushing, and shoving all day long. Claimant testified that he grabbed, pulled, and stacked loads of cardboard, lifted them up, and put them on the feeder and would do so for eight, 10, and sometimes even 12 hours per day. His job required him to repeat that process over and over again. Sometime in September or October 1991, he said he mentioned to his coworker,Mr R, that his elbows were cramping. He called the plant supervisor at the time who came over to his machine. Claimant complained to him of pain and numbness in his arms and the superintendent told claimant he would get him some elbow braces, but never did so. Claimant denied knowing at that time that his elbow problems were related to his work saying, "I'm not a doctor." Claimant lost no time from work, sought no medical treatment for his elbows, and, on (date of injury), was involved in an automobile accident which resulted in his being off work until May 11 1992 when he resumed work on the machine under the immediate supervision of Mr. F.

When claimant resumed work on the machine, his elbows again began to hurt. He said his elbows did not hurt while he was off work but that it did not occur to him that his elbow problems were caused by his work, and that he was unaware of such until he was so advised by his treating doctor, Dr. H in July 1992. Approximately one week after returning to work, claimant told the plant manager, Mr S, that his elbows were starting to hurt again and that his wrists were getting numb. There was no response, so a few weeks later he told the plant superintendent, Mr M, that Mr. S had not provided braces as he said he would. Mr. M said he would talk to someone and for claimant to return to work. Again, nothing came of these discussions and claimant continued to experience cramping and numbness from his wrists to his elbows. Claimant said that on July 15, 1992, he talked to Mr. F and related his prior discussions with Messrs. S and M. Mr. F testified that this discussion took

place some time in July. He prepared an accident report, discussed the matter with Mr. S, and claimant was provided with braces. While the braces helped somewhat, claimant said he still felt pain, developed a rash from wearing them, and later had to take them off. Approximately two weeks later, claimant contacted Mr. F and asked to see a doctor. He was seen by the company doctor, Dr. B, who he said took x-rays, touched his arms, told him he had no injuries or broken bones, and returned him to work with a 10 pound lifting restriction. At that point, claimant asked to be seen by his own doctor, Dr. H, with whom he had previously treated. In the meantime, claimant was assigned light duty which consisted of sweeping the floor areas over and over again. When he again complained of his painful elbows, employer sent him back to Dr. B who lowered his weight restriction to two pounds and returned him to work. At that point claimant said employer had him sit in a conference room and view safety films over and over again for eight hours. When he was told the next day to continue to view the films, he complained to Mr. S who responded that he need not make it (light duty) interesting, funny, or nice, and that if claimant did not like it, he could take off.

Claimant stated that he saw Dr. H on July 28th and was taken off work that day for about one month to undergo tests. He said that Dr. H released him to return to work on August 25th and at that point he was ready, willing, and able to resume his employment. When he gave his release to Mr. S, the latter told claimant he "did not know where we stand on this because if you can work on a roof, I don't see why you can't do your work." Carrier introduced photographs taken on August 3rd showing claimant on the roof of a carport nailing tarpaper. Claimant said he had volunteered to help his neighbor construct a carport and that his elbows hurt when he assisted. Claimant testified he was subsequently terminated. He said he has been willing and able to work ever since being released by Dr. H, that he applied for and received unemployment benefits, and has applied for jobs but has not been successful in finding employment.

Claimant's supervisor, Mr. F, testified that some time in July 1992 claimant said his elbows were hurting, that he did not know why they were hurting, requested braces, and later asked to see a doctor. Mr. F said he prepared an accident report and gave it to employer's personnel manager. The testimony of claimant's coworker, Mr R, essentially amounted to an adoption of the written statement he provided claimant's attorney in September 1992. In that statement, Mr. R said he and claimant both filed accident reports with employer on July 8, 1992 for the same type of injuries, namely, progressive damage to their wrists and elbows due to operating the Curioni machine. The records of Dr. B from the Gateway Industrial Medical Clinic indicate that he saw claimant on July 15, 1992. They refer to complaints of pain at right and left elbows and numbness in left hand since October 1991 due to repetitive movements, note negative x-rays, diagnose elbow, forearm, and hand sprains, and return him to work with 10 pound and no wrist rotation restrictions. One week later Dr. B increased the restriction to two pounds. Dr. H medical records reflect that claimant visited him on July 27, 1992, that he diagnosed bilateral carpal tunnel syndromes

and bilateral ulnar nerve entrapment syndromes, and that the history made reference to claimant's repetitive work activity. Dr. H wrote the carrier on September 22nd stating that he took claimant off work for four weeks to obtain electromyographic evidence and commence a physical therapy program, that there was electromygraphic evidence of claimant's bilateral carpal tunnel and ulnar nerve entrapment syndromes, and that claimant's injury claim was not fictitious notwithstanding his being photographed working on a neighbor's roof. Dr. H report of August 25, 1992 released claimant to return to work without apparent limitation and planned conservative treatment.

In arguing the case to the hearing officer, the carrier did not contend that claimant did not prove he sustained a repetitive trauma injury. Rather, carrier focused on claimant's credibility urging that he knew or should have known in October 1991 that his condition was related to his work, and thus his reporting his injury to employer in July 1992 was untimely. Carrier also urged that claimant had not proved he had disability under the 1989 Act because he applied for and received unemployment benefits, a process which required claimant to hold himself out as being willing and able to work, and, because the surveillance photographs demonstrated his ability to work at that time.

The hearing officer concluded that claimant suffered a repetitive trauma injury in the course and scope of his employment and the evidence, including the testimony concerning the repetitive nature of claimant's work activities for 12 years, and Dr. H records, is sufficient to support that conclusion. Under the 1989 Act, a repetitive trauma injury is an occupational disease and can be compensable when proven. *See generally* Texas Workers' Compensation Commission Appeal No. 91026, decided October 18, 1991.

Regarding the issue of timely notice of the injury, the hearing officer made the following pertinent factual findings and legal conclusions:

**Findings of Fact**

5.Sometime in October, 1991, Claimant informed the plant supervisor, a person in a management or supervisory position with Employer, that he was experiencing cramps and pain in his elbows and was promised braces for his arms.

6.Claimant continued to experience cramps and pain in his arms and elbows; continued to tell the plant manager, Mr S, a person in a management or supervisory position with Employer, about these pains; and was eventually supplied with arm braces.

7.Although Claimant had been telling various supervisory and/or management personnel about his work injury since October, 1991, Claimant's supervisor did not fill out an accident report until July 8, 1992.

## Conclusions of Law

3.Claimant gave his Employer timely notice of this injury, beginning with his first report to the plant supervisor in October, 1991, and continuing through and past the time Claimant's supervisor filed an accident report on July 8, 1992.

4.Claimant had disability for a period of four weeks, beginning on July 28, 1992, and ending on August 25, 1992.

Article 8308-5.01(a) provides, in part, that if an injury is an occupational disease, the employee shall notify the employer of the injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment.

The carrier asserts that the hearing officer's determination that claimant timely reported the injury is based on "contradictory and irreconcilable" findings, that Conclusions of Law Nos. 3 and 4 are contradicted by Findings of Fact 5 though 7 and by Conclusion of Law No. 3, that "the hearing officer finds a July 1992 date of injury, but concludes that the injury was reported to the employer as early as October 1991," and that the hearing officer's determination of the reporting date is "preposterous" in that claimant could not possibly have reported a July 1992 injury to Employer in October 1991.

Carrier several times alludes to the hearing officer's having found a July 1992 date of injury. Carrier further contends, by way of challenge to the determination of a compensable injury, that claimant's testimony that he did not know his work caused his injury until told by Dr. H in late July 1992 is not credible; that claimant did know, or should have known, his arm complaints were related to his work in October 1991; and that the hearing officer erred in concluding that claimant suffered an injury in July 1992.

Although the first issue was whether claimant suffered a compensable injury on July 8, 1992, the hearing officer failed to fully determine that issue. While concluding that claimant did suffer a compensable repetitive trauma injury, the hearing officer failed to determine the date of the injury. The three stipulations and first three factual findings all refer to July 8, 1992. However, as might be expected, the evidence is in conflict respecting the date of the occupational injury. Claimant testified that he discussed his pain and cramping with his coworker, Mr R, and with the plant superintendent in October 1991, and

nothing came of it. There was no evidence that these discussions related his complaints to his work, however. When his discomfort reoccurred upon resuming work in May 1992, claimant spoke to various supervisory or managerial personnel about his painful elbows and wrists. He was eventually provided with braces, which did not alleviate the problems, and he sought medical assistance and was seen first by Dr. B and later by Dr. H. Claimant testified he did not know his problems were job-related until he saw Dr. H, on or about July 28th, and did not testify to having given information to any of employer's personnel that his problems were job related. Mr. F testified that sometime in July 1992, claimant said he was having problems with his elbows and asked for a brace; that claimant did not say what he thought was causing his elbows to hurt; that he eventually was provided with a brace; and that later on claimant asked to see a doctor and Mr. F filled out an accident report. Mr. R statement said that on July 8th, he and claimant filed accident reports with employer claiming the same type of injuries, namely, progressive injuries to their wrists and elbows from using the Curioni machine. Dr. B records refer to an injury date of "10 - - 91;" Dr. ' records refer to an injury date of "10/1/91;" and the Benefit Review Conference Report refers to an injury date of "7-8-92."

Findings of Fact Nos. 5 and 6 are consistent with claimant's testimony that he did not know his problems were work related before seeing his doctor. Finding of Fact No. 7 is inconsistent with claimant's testimony to the extent it refers to claimant's telling various employer supervisory personnel about his "work injury since October 1991" since there is no evidence his discussion or complaints to such personnel of his condition related it to his work. Indeed, Mr. F testified claimant did not say what he thought was causing his elbows to hurt.

While we find the evidence sufficient to support the hearing officer's determination that claimant did suffer a compensable repetitive trauma injury, we are unable to ascertain whether claimant provided employer with timely notice thereof until the hearing officer first determines the date of the injury and we must therefore remand the case for such further findings and conclusions as are appropriate and not inconsistent with this opinion. Article 8308-4.14 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment.

As for the disability issue, the hearing officer's conclusions that claimant had disability for a period of four weeks, beginning on July 28, 1992, and ending on August 25, 1992, are sufficiently supported by the findings and the evidence, and need not be further addressed.

The case is reversed and remanded for such additional factual findings and legal conclusions by the hearing officer as are necessary and appropriate to determine the date of the compensable injury and fully determine the timely notice issue. Pending resolution

of the remand, a final decision has not been made in this case. However, since reversal and remand necessitates the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8306-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge